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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Mark Budzik	)	
		)	
Application:	10/685,750	)	Gay Spahn
		)	Patent Examiner
Filing Date:	October 15, 2003	)	Art Unit 3763
		)	
Docket No.:	TRI4546P0170US	)	

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

You are requested to charge the requisite fee for filing of this brief to Deposit Account No. 23-0785. If any extension of time is required for filing of this brief, you are requested to grant the extension of time and to charge the requisite fee for the extension of time to Deposit Account No. 23-0785.

Real Party in Interest

The real party in interest is Trim-Tex, Inc., an Illinois corporation located at 3700 West Pratt Avenue, Lincolnwood, Illinois 60712.

Related Appeals and Interferences

As of filing of this brief, no related appeals or interferences are known, which would directly affect or be directly affected by, or having a bearing on, the decision of the Board in this appeal.

Status of claims

Claims 1 through 10 stand as rejected and their rejection is being appealed. Claims 11 through 32 stand as withdrawn from consideration.

Status of amendments

No amendments have been filed since the Office Action containing the final rejection was mailed on September 22, 2005.

Summary of claimed subject matter

Referring to reference numbers in Figures 1 and 2, claim 1 claims a drywall-trimming accessory (10) having a flange (30), which has two expansive surfaces (32, 34) facing oppositely, wherein the drywall-trimming accessory (10) is made from a cellular polymer and wherein at least part of at least one of the expansive surfaces (32, 34) is characterized by open cells of the cellular polymer.

Referring to reference numbers in Figures 1 and 2, claim 5 claims a drywall-trimming accessory (30) having two diverging flanges (30), each of which has two expansive surfaces (32, 34) facing oppositely, wherein the drywall-trimming accessory (10) is made from a cellular polymer and wherein at least part of at least one of the expansive surfaces (32, 24) of each flange (30) is characterized by open cells of the cellular polymer.

Referring to reference numbers in Figures 1 and 2, claim 7 claims a drywall-trimming accessory (10) having two diverging flanges (30), each of which has two expansive surfaces (32, 43) facing oppositely, wherein the drywall-trimming accessory (10) is made from a cellular polymer and wherein at least part of each expansive surface (32, 34) of each flange (30) is characterized by open cells of the cellular polymer.

Ground of rejection to be reviewed on appeal

The ground of rejection to be reviewed in this appeal is the rejection of the rejected claims are being unpatentable under 35 U.S.C. § 103(a) over Koenig, Jr. (US 2002/013541 A1) in view of Hawley's Condensed Chemical Dictionary and Hoffman, Sr. (US 6,684,586 B1).

Argument

The patent examiner has contended that Koenig, Jr. *et al.* (US 2002/013541 A1) discloses a drywall-trimming accessory made from a cellular polymer. As the patent examiner has noted, Koenig, Jr. *et al.* discloses a drywall-trimming strip, which is an example of a drywall-trimming accessory having a flange, and which is "extruded from a polymeric material, such as polyvinyl chloride." The patent examiner has noted in Hawley's Condensed Chemical Dictionary that "[f]lexible foams may be ... polyvinyl chloride ...."

The undersigned attorney submits that, although polyvinyl chloride is capable of being foamed, polyvinyl chloride is not foamed ordinarily, that a disclosure of polyvinyl chloride without any reference to its being foamed or its being cellular is not a disclosure of polyvinyl chloride being foamed or being cellular, and that it is improper hindsight to read into Koenig, Jr. *et al.* that its disclosure of polyvinyl chloride is a disclosure of a cellular polymer. The undersigned attorney does not submit, however, that the drywall-trimming strip of Koenig, Jr. *et al.* could not be made from a cellular polymer.

In any event, even if it were assumed *arguendo* that the disclosure of polyvinyl chloride in Koenig, Jr. *et al.* is a disclosure of a cellular polymer, the patent examiner has acknowledged that "Koenig, Jr. et al. fail to disclose claim 1's limitation that at least part of at least one of the expansive surfaces is characterized by open cells of the cellular polymer."

The patent examiner has referred to Hoffman, Sr. (US 6,684,586 B1) which also discloses a drywall-trimming strip, and which discloses in column 2, lines 19-22, that "the strip is perforated and knurled to increase the surface area and to facilitate the ability of construction adhesives and drywall compound to adhere to the surface of the strip."

The patent examiner has drawn a conclusion, which the undersigned attorney submits is an improper conclusion, that "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the drywall-trimming accessory (strip 10) of Koenig, Jr. et al. by milling, abrading or otherwise roughening at least a part of at least one of the expansive surfaces of the

flanges thereof and contacting the same part of the same one of the expansive surfaces of the flange thereof to a drywall-finishing compound as taught by Hoffman, Sr. in order to increase the surface area and this expose the open cells of the cellular polymer to the drywall compound so that the drywall trimming accessory would be better able to absorb the drywall compound."

The undersigned attorney submits that, even if it were assumed *arguendo* that Koenig, Jr. *et al.* disclosed a cellular polymer and that a surface of the drywall-trimming strip of Koenig, Jr. *et al.* would be perforated and knurled as taught by Hoffman, Sr., the record does not support a conclusion that the surface, so perforated and knurled, would be characterized by open cells of the cellular polymer. The undersigned attorney submits, rather, that perforations of a flange made from a cellular polymer would not be open cells of the cellular polymer and that the record does not reveal how perforating or knurling would affect a flange made from a cellular polymer.

The statement by the patent examiner that "[w]hether forming the Koenig, Jr. et al. corner strip of an open or closed cell polyvinylchloride, the cells of the cellular polyvinylchloride would be exposed upon milling or knurling the surface of the corner strip" exhibits impermissible hindsight with regard to milling, which the prior art applied by the patent examiner does not disclose or suggest, and is unsupported by any evidence in the record with regard to knurling.

Respectfully submitted,

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Claims appendix

Claims 1 through 10, on appeal, are reproduced below.

1. A drywall-trimming accessory having a flange, which has two expansive surfaces facing oppositely, wherein the drywall-trimming accessory is made from a cellular polymer and wherein at least part of at least one of the expansive surfaces of the flange is characterized by open cells of the cellular polymer.

2. The drywall-trimming accessory of claim 1, wherein the same part of the same one of the expansive surfaces of the flange is contacted by a drywall-finishing compound, which penetrates said cells.

3. A drywall-trimming accessory having a flange, which has two expansive surfaces facing oppositely, wherein the drywall-trimming accessory is made from a cellular polymer and wherein at least part of each expansive surface of the flange is characterized by open cells of the cellular polymer.

4. The drywall-trimming accessory of claim 3, wherein the same part of each expansive surface of the flange is contacted by a drywall-finishing compound, which penetrates said cells.

5. A drywall-trimming accessory having two diverging flanges, each of which has two expansive surfaces facing oppositely, wherein the drywall-trimming accessory is made from a cellular polymer and wherein at least part of at least one of the expansive surfaces of each flange is characterized by open cells of the cellular polymer.

6. The drywall-trimming accessory of claim 5, wherein the same part of the same one of the expansive surfaces of each flange is contacted by a drywall-finishing compound, which penetrates said cells.

7. A drywall-trimming accessory having two diverging flanges, each of which has two expansive surfaces facing oppositely, wherein the drywall-trimming accessory is made from a cellular polymer and wherein at least part of

each expansive surface of each flange is characterized by open cells of the cellular polymer.

8. The drywall-trimming accessory of claim 7, wherein the same part of each expansive surface of each flange is contacted by a drywall-finishing compound, which penetrates said cells.

9. The drywall-trimming accessory of any one of claims 1 through 8, which is an elongate strip.

10. The drywall-trimming accessory of claim 9, wherein the polymeric material is polyvinyl chloride.

Claims 11 through 32 stand as withdrawn from further consideration.

Evidence Appendix

none

Related proceedings appendix

none